COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

ROBIN MAGNER,
Appellant

v. G2-07-43[1]

TOWN OF BROOKLINE,
Respondent

Appellant's Attorney: Michael J. Maccaro, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Respondent's Attorney: Brian Magner, Esq.
Deutsch Williams Brooks DeResnis
& Holland P.C.
One Design Center Place
Boston, MA 02210

Hearing Officer: John J. Guerin

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

Pursuant to G.L. c. 31, §§ 42 and 43, the Appellant, Robin Magner (hereinafter "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") contesting the provisional appointment of Mr. Dai Q. Nguyen (hereinafter "Mr. Nguyen") by the Respondent, Town of Brookline (hereinafter "Town") as Appointing Authority, to the position of Sanitarian, an "official service" position for

[1] Due to administrative error, this appeal was incorrectly assigned a docket number with a "G2" prefix, which is used to denote a "promotional appointment" bypass appeal. It should have been assigned a docket number with a "G1" prefix, which denotes an "original appointment" bypass appeal.

which the Appellant was also a candidate. The Appellant is also appealing her non-selection to the position.

On November 20, 2006 the Appellant and her Union, AFSCME, Local 1358 (hereinafter "Union"), filed a contractual grievance contesting the provisional appointment of Mr. Nguyen. (Jt. Exh. 11). On January 11, 2007, the Appellant filed an appeal with the Commission pursuant to G.L. c. 31, §§ 42 and 43. (Jt. Exh. 12). On January 15, 2008, the parties appeared before then-Commissioner John J. Guerin, Jr.[2] for a full hearing on the Appellant's appeal. Prior to the commencement of the full hearing, however, the Town informed Commissioner Guerin and the Appellant's attorney of its intent to make a motion to dismiss based on the Appellant's lack of standing and the Commission's lack of jurisdiction to hear the appeal. After a discussion with Commissioner Guerin, the parties agreed to submit "Joint Stipulations and Exhibits" and written briefs outlining their respective positions on the standing and jurisdictional issues raised by the Town. Pursuant to 801 CMR 1.01(4)(a), 1.01(7)(a) and 1.01(7)(g)(3), the Town filed a Motion to Dismiss the appeal citing the Appellant's lack of standing to bring such an appeal, the Appellant's failure to state a claim for which relief may be granted and the Commission's lack of jurisdiction to hear the Appellant's appeal. The Motion to Dismiss was dated July 1, 2008. Also on July 1, 2008, the Appellant filed with the Commission an Opposition to the Town's Motion to Dismiss the appeal.

[2] Mr. Guerin, a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision.

I. JOINT STIPULATIONS AND EXHIBITS

A. Preliminary Matters

The Appellant's appeal seeks to challenge her non-selection to a position within the Health Department of the Town. The correct job title and job description for this position is a matter of dispute between the parties. Prior to 2005 the position in dispute had the job title of "Sanitarian." In January of 2005, the job title and job description of the "Sanitarian" position were changed as the result of a Town-wide classification and pay plan study. The new title of the "Sanitarian" position was "Public Health Sanitarian". The Union filed an unfair labor practices charge at the Massachusetts Division of Labor Relations (hereinafter "DLR") contesting the change in job title and job description, alleging the Town failed to properly bargain prior to implementing the changes. To the Commission's knowledge and belief, the Union's charge was still pending at the DLR at the time of this decision. Notwithstanding the aforementioned dispute, the parties agree, for the sake of clarity and uniformity, that the written submissions associated with the Town's Motion to Dismiss will refer to the position as **"Sanitarian"**. The job description of the "Sanitarian" position, and the successor job description of the "Public Health Sanitarian" position are attached as Joint Exhibit 1.

Further, effective January 2005, the job title and job description of the Appellant's current position was also changed as a result of the Town-wide classification and pay plan study referenced above (these changes are not being challenged by the Union). For the sake of clarity and uniformity, the parties' written submissions will refer to the Appellant's current position of "Senior Public Health Inspector" as simply **"Sanitary**

Inspector". The current job description for "Senior Public Health Inspector" position is attached as Joint Exhibit 2.

By referring to the position which is the subject of the Appellant's appeal as **"Sanitarian"**, and her current position as **"Sanitary Inspector"**, the parties are using job titles consistent with those used in the Human Resources Division (hereafter "HRD") Municlass Manual.

Therefore, for the purposes of the Town's Motion to Dismiss the organizational chart in the Brookline Health Department is as follows:

Director of Public Health (Dr. Alan Balsam)
I
Director of the Environmental Health Division (Patrick Maloney)
I
Sanitarian (Position Appellant sought provisional appointment to – now filled by Mr. Nguyen)
I I I
(3) Sanitary Inspectors (Appellant's current position)

B. Issues

1. Does the Appellant have standing to file this instant appeal challenging the Town's provisional appointment of Mr. Nguyen to the position of Sanitarian in November of 2006?

2. If so, did the Town substantially comply with G.L. c. 31, § 12 when it provisionally appointed Mr. Nguyen to the position of Sanitarian in November of 2006?

3. If not, what shall the remedy be?

C. Stipulated Facts

1. Dr. Alan Balsam (hereinafter "Dr. Balsam") is the Director of the Town of Brookline Health Department and held this position at all times relevant to this dispute. Working under Dr. Balsam are numerous Division Directors, including Patrick Maloney (hereafter "Mr. Maloney"), who is the Director of the Environmental Health Division. Mr. Maloney supervises one Sanitarian and three Sanitary Inspectors.
2. In June of 1996 the Town provisionally appointed the Appellant to the position of Sanitary Inspector. The Appellant attained permanent civil service status in the Sanitary Inspector position as of July 1, 2000, as a result of a special act of the legislature conferring permanent civil service status upon certain Town employees who had been provisionally appointed to their positions (Chapter 159, section 338 of the Acts of 2000). As of the date of these joint stipulations, the Appellant remains in the position of Sanitary Inspector.
3. In January of 2005 the Town provisionally appointed Mr. Nguyen to the position of Sanitary Inspector. The HRD, however, has been unable to locate a civil service record for Mr. Nguyen.
4. In September of 2006 the Town sought to fill the position of Sanitarian.
5. According to the HRD Municlass Manual, the Sanitarian position is in a mutually exclusive job series from the Sanitary Inspector position.
6. In the HRD Municlass Manual, the Sanitarian position is in the official service and listed as #0688A. This number represents the position's group, series and title. The Sanitarian position's group, series and title are as follows:

Group (06) = Medical, Hospital, Dental and Public Health Group

Series (88) = Sanitarian Series (This series includes positions of a professional nature which administer, supervise, or perform work in all phases of the public health inspection field and develop programs and standards of environmental sanitation)

Title (A) = Sanitarian Title

7. In HRD Municlass Manual the Sanitary Inspector position is in the official service and listed as #1865A. The Sanitary Inspection group, series and title are as follows:

Group (18) = Investigatory Group

Series (65) = Sanitary Inspection Series (This series includes semi-professional positions of a technical, specialized or support nature which perform routine inspections for general sanitary conditions, control of pests, waste disposal, air pollution, sanitary nuisances, and odors)

Title (A) = Sanitary Inspector

8. The most recent civil service examination administered by the HRD for the title of Sanitarian was held on August 18, 1990. The Appellant took and passed this examination, and her name appeared on the eligibility list established by HRD on December 31, 1990. The HRD[3] revoked this eligibility list on September 30, 1997. Therefore, there was no current eligibility list for the position of Sanitarian when the Town sought to fill the position in the Fall of 2006.

9. The Town advertised for the Sanitarian position internally in accordance with the collective bargaining agreement between the Town and the Union, and externally through advertisements in major newspapers and on trade publication websites.

[3] As they appear in the text of this decision, the applicable sections of the Civil Service statute and in the written excerpts of the parties' submissions, the terms "HRD", "personnel administrator" and "the administrator" will be used interchangeably for the purpose of this decision.

10. The Town received seven applications for the Sanitarian position, two from internal candidates (the Appellant and Mr. Nguyen) and five from external candidates.

11. Of the seven candidates, the Town sought to interview four, but ultimately interviewed three. Of the three candidates interviewed, two were internal (the Appellant and Mr. Nguyen) and one was external.

12. The Town determined that Mr. Nguyen was the only candidate qualified for the position of Sanitarian and, in November of 2006, provisionally appointed him to the position.

13. The Town determined that the Appellant was not qualified for the position of Sanitarian.

14. In November of 2006, the Town did not seek the approval of the Personnel Administrator to provisionally appoint Mr. Nguyen to the position of Sanitarian.

15. On November 20, 2006 the Appellant and her Union filed a contractual grievance contesting the provisional appointment of Mr. Nguyen to the position of Sanitarian. On January 11, 2007, the Appellant filed an appeal pursuant to G.L. c. 31, §§ 42 and 43.

D. Joint Exhibits

Joint Exhibit 1	Job Descriptions for **Sanitarian** and Public Health Sanitarian (see explanation given at the beginning of this Motion to Dismiss)
Joint Exhibit 2	Job Description for Senior Public Health Inspector Position (as noted above, for the purposes of this motion only, the parties agreed to refer to this position as **Sanitary Inspector**)

Joint Exhibit 3	Excerpted Portions of the HRD Municlass Manual
Joint Exhibit 4	Letter from HRD dated January 15, 2008
Joint Exhibit 5	Internal Job Posting for Sanitarian Position
Joint Exhibit 6	Boston Globe Advertisement for Sanitarian
Joint Exhibit 7	List of Applicants
Joint Exhibit 8	Interview Schedule
Joint Exhibit 9	Cover Letter and Resume of Dai Nguyen
Joint Exhibit 10	Cover Letter and Resume of Appellant
Joint Exhibit 11	Contractual Grievance dated November 20, 2006
Joint Exhibit 12	Section 42-43 Appeal Form dated January 11, 2007

Contained within the stipulated facts and exhibits submitted by the parties, the HRD filed a submission with the Commission on January 15, 2008 (Joint Exhibit 4) representing documents retained by the HRD relevant to the instant appeal, which documents support the following facts that assisted the parties in formulating their stipulations:

1. The Appellant is permanent in the title of Senior Sanitary Inspector with a civil service date of July 1, 2000.
2. HRD has not been able to locate a civil service record for Mr. Nguyen.
3. Sanitarian is an official service title. There is no current eligible list for Sanitarian.
4. The most recent examination for the title of Sanitarian was held on August 18, 1990. The HRD established the eligible list for Sanitarian from the 1990 examination on December 31, 1990.The HRD revoked this eligible list on September 30, 1997.
5. The Appellant took and passed the examination for Sanitarian held on August 18, 1990.
6. The HRD has no record of the Town requesting to make or making a provisional appointment in 2006 to the title of Sanitarian.
7. The Sanitarian title is contained within the Sanitary Series within the HRD Municlass Manual.

8. The Senior Sanitary Inspector title is contained within the Sanitary Inspection Series within the HRD Municlass Manual.
9. The most recent examination for the title of Sanitary Inspector was held on March 4, 1992. The HRD established the eligible list for Sanitary Inspector from the 1992 examination on May 28, 1992. The HRD revoked this eligible list on June 30, 1997.

The record of this matter demonstrates that the Town made a provisional appointment of Mr. Nguyen to the official service position of Sanitarian. A provisional appointment of this kind is governed by the following three (3) relevant sections of the Civil Service statute:

> **G.L. c. 31, § 12. Provisional appointments**
>
> An appointing authority may make a provisional appointment to a position in the official service with the authorization of the administrator or, if the appointing authority is a department, board, commission, institution or other agency within an executive office, with the authorization of the secretary of such office. Such authorization may be given only if no suitable eligible list exists from which certification of names may be made for such appointment or if the list contains the names of less than three persons who are eligible for and willing to accept employment and the appointing authority submits a written statement to the administrator that each person whose name was certified and who reported for an interview was interviewed and considered for appointment and states sound and sufficient reasons, satisfactory to the administrator, for not making an appointment from among such persons. A provisional appointment may be authorized pending the establishment of an eligible list. Such authorization shall be void unless exercised within tow weeks after it is granted.
>
> After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list. Such examination shall be held and such eligible list shall be established within one year from the date of such authorization if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth or any of its political subdivisions. If, as the result of such examination, no suitable eligible list is established, the administrator, upon the request of the appointing authority, may authorize an extension of the provisional appointment pending the results of another examination. Upon authorization of such an extension, the administrator shall arrange to hold

a new examination forthwith and to determine the results of such examination. The eligible list resulting from such new examination shall be established within eighteen months of the determination of the results of the last previous examination, provided, however, that such new examination shall be held no later than one year from the date the last examination was held if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth of any of its political subdivisions.

If no eligible list is established after a second examination for the same position, the administrator and the appointing authority shall confer and decide what action shall be taken, such as the holding of another examination on a different basis.

G.L. c. 31, § 13. Provisional appointments; notice; filing

An appointing authority, in requesting authorization to make a provisional appointment, shall file with the administrator or, if the appointing authority is a department, board, commission, institution or other agency within a executive office, with the secretary in charge of such office, a notice containing: (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.

G.L. c. 31, § 14. Provisional appointments; authorization; reports; length of service; termination

Upon receipt of the notice described in section thirteen, the administrator or the secretary in charge of the executive office, as the case may be, may authorize a provisional appointment if he determines that the contents of the notice are satisfactory. If the administrator or secretary and the appointing authority which filed the notice agree that the duties, qualifications and entrance requirements are correct as stated in the notice and if no person who meets the entrance requirements can be found for provisional appointment to the position pending the holding of an examination and the establishment of an eligible list, the position shall remain unfilled until such eligible list is established; provided, however, that if an emergency exists, and the appointing authority describes the

> reasons for the emergency, and submits a statement which describes to the satisfaction of the administrator the steps which have been taken to find a person who meets the entrance requirements for the position, the administrator may authorize a provisional appointment of a person who does not meet such entrance requirements. Such authorization in the case of such emergency shall not constitute a finding that the person so provisionally appointed is eligible to take the examination for such position.
>
> Each provisional appointment shall be reported by the appointing authority to the administrator. A provisional appointment may be terminated by the administrator at any time and, except as provided in the preceding paragraph, shall be terminated forthwith whenever the administrator or secretary shall determine that the person appointed does not, in fact, possess the approved qualifications or satisfy the approved requirements for the position. The administrator shall have the authority to terminate a provisional appointment which was approved by a secretary of an executive office.
>
> Except as otherwise provided by section fifteen, nor provisional employment in a position shall be authorized, approved, or continued for more than thirty days following a certification from an eligible list if such list contains the names of three persons eligible for and willing to accept appointment to such position.
>
> A provisional appointment shall be terminated if there is a change in the nature of the employment or in the salary of the person who has been provisionally appointed.

Respondent's Argument for Dismissal of the Appeal

The Town argues that the Appellant lacks standing to appeal the provisional appointment of Mr. Nguyen to the Sanitarian position, as well as her non-selection to same since the position is an official service title for which no suitable eligible list exists. Citing G.L. c. 31, § 12, the Town asserts that an Appointing Authority may make a provisional appointment when there is no suitable list from which to make a permanent appointment. The Town claims that when it sought to fill the open Sanitarian position in

the Fall of 2006, it was "common knowledge" that HRD had no suitable eligibility list available because it had not administered an exam in over 15 years. In fact, 1990 was the last year in which the HRD had administered an exam and established an eligibility list for the Sanitarian position. By statute, this 1990 eligibility list should have expired when a new exam was administered and a new eligibility list was established two years later in 1992. (G.L. c. 31, § 25). However, since no new exam was ever administered, the 1990 eligibility list remained active until HRD affirmatively revoked it in 1997. By revoking the 1990 eligibility list in 1997, HRD made a determination that the list needed to be revoked in order to maintain the very merit system on which civil service is based. (G. L. c. 31, § 25).[4] With no eligibility list available from HRD, the Town decided to make a provisional appointment to fill the Sanitarian position.

The Town further argues that because the Appellant filed her appeal with the Commission pursuant to G.L. c. 31, §§ 42 and 43, such an appeal is inappropriate in this case because the Appellant is seeking to challenge her non-selection to the Sanitarian position, as opposed to any action or decision by the Town pursuant to section 41. The Town further asserted that, even if the Appellant had filed her appeal pursuant to G.L. c. 31, § 2(b), the appeal still should be dismissed. As basis for this assertion, the Town cited section 2(b) which provides, in relevant part, that *"No person shall be deemed to be aggrieved under the provisions of this section unless . . . such person has made specific*

[4] G.L. c. 31, § 25 provided in relevant part: "Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine, **but in any event not to exceed two years**, unless one of the following exceptions applies: . . . (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established; **provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation** and, provided further, that a written notice and explanation for said revocation is sent to the clerks of the senate and house of representatives."

allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status." The Town argues that the provisional appointment of Mr. Nguyen did not violate the "basic merit principles" nor did it cause any "actual harm" to the Appellant's employment status. G.L. c. 31, § 1 defines the basic merit principles in relevant part as *"(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; . . . and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions."*

To support this argument, the Town stated the following in its written Motion to Dismiss:

> "Mr. Nguyen clearly possessed the knowledge, skills and abilities necessary to perform the duties of the Sanitarian position, while the Appellant did not. Mr. Nguyen had a Bachelor's degree in Chemistry from Boston College; was in the process of obtaining his Master's degree in Public Health from Boston University; had been a health inspector for eight years; was both a Massachusetts and National Registered Sanitarian; and performed very well during his interview, especially with respect to being well versed in many of the technological advancements being incorporated into the public health field. (Attach. 1, Balsam Affidavit, ¶ 5 and Jt. Exh. 9) The Appellant, on the other hand, was in the process of pursuing a Bachelor's degree, but in a non-science related field; was not a Massachusetts or National Registered Sanitarian, and was not eligible to take the State or National exams because she did not have a Bachelor's degree; and had no articulated or demonstrated skills or abilities in terms of integrating new technologies into the public health field. (Attach. 1, Balsam Affidavit, ¶ 6 and Jt. Exh. 10) Therefore, the provisional

appointment of Mr. Nguyen to the Sanitarian position was in accordance with chapter 31's basic merit principle.[5]

Furthermore, the provisional appointment of Mr. Nguyen did not cause any actual harm to the Appellant's employment status with the Town. In June of 1996, the Town provisionally appointed the Appellant to the position of Sanitary Inspector. The Appellant attained permanent civil service status in the Sanitary Inspector position as of July 1, 2000, as a result of a special act of the legislature conferring permanent civil service status upon certain Town employees who had been provisionally appointed to their positions (Chapter 159, section 338 of the Acts of 2000). As of the date of this written submission, the Appellant remains in the position of Sanitary Inspector. (Jt. Exh. 4 and Jt. Stip. 2). As the provisional appointment of Mr. Nguyen to the Sanitarian position was in accordance the basic merit principles of chapter 31 and the Appellant suffered no actual harm to her employment status with the Town, any appeal pursuant to M.G.L. c. 31, § 2(b) should be dismissed. See Kane and Lorenzi v. Holyoke Dept. of Public Works, 6 MCSR 191, 192-193 (1996) (copy attached).

In Holyoke Dept. of Public Works, the appellants and current City of Holyoke employees Charles Kane and Carmelo Lorenzi ("Mr. Kane" and "Mr. Lorenzi") filed an appeal pursuant to M.G.L. c. 31, § 2(b) seeking to challenge the City's provisional appointment of an external candidate to the Automotive Maintenance Foreman position pursuant to M.G.L. c. 31, § 12. The Commission found that neither of the appellants had been aggrieved because both were still employed by the City in the same or better positions. Therefore, as the City's provisional appointment did not cause the appellants to suffered any actual harm to their employment status, they had no actionable claim pursuant to M.G.L. c. 31, § 2(b) and their appeals were dismissed. See Holyoke Dept. of Public Works, supra at 192-193."

The Town claims that the Appellant was not harmed by the Town's admitted failure to contact the HRD and specifically confirm that there was no suitable eligibility list for the Sanitarian position, in accordance with the provisions of G.L. c. 31, § 12. In support of this claim, the Town stated:

"First, in 2006 it was common knowledge that HRD had not administered an exam for the Sanitarian position in many years (since 1990) and that

[5] There is nothing in the record to suggest that either the Appellant, the selected candidate or any other candidate for this provisional appointment.

> there was no active eligibility list (revoked in 1997). Second, even assuming, for the sake of argument only, that HRD technically could have revived the 1990 eligibility list, such a result was implausible under the circumstances. HRD revoked the 1990 eligibility list in 1997 in order to maintain the very merit system on which civil service is based. (M.G. L. c. 31, § 25). A fifteen year old exam in the public health field is meaningless in determining whether an individual is qualified for a position in 2006. Over the past fifteen years there have been innumerable scientific and technological advancements that have dramatically changed the skills, knowledge and abilities required for many positions in the public health field, including the Sanitarian position. (Attach. 1, Balsam Affidavit, ¶ 4) Therefore, the Appellant was not harmed by either HRD's decision to revoke the 1990 eligibility list or the Town's failure to confirm that no suitable eligibility list existed. See Callahan v. Personnel Administrator for the Commonwealth, 400 Mass. 597 (1987) (copy attached) (court found that the civil service system conferred only limited rights on those on eligibility lists and that the administrator is given a measure of discretion over when a list expires)."

The Town asserts that its failure to contact the HRD and get approval for the provisional appointment of Mr. Nguyen to the Sanitarian position was "an administrative oversight that the Town should have the opportunity to cure with HRD." In support of this assertion, the Town stated:

> "When provisionally appointing Mr. Nguyen, the Town was merely required to file a notice with HRD containing a ***"substantiation"*** that Mr. Nguyen meets the proposed requirements for appointment to the Sanitarian position and possesses the knowledge, skills and abilities necessary to perform the duties of the position. (M.G.L. c. 31, § 13). Upon receipt of the notice from the Town, HRD would authorize the provisional appointment if it determined that the contents of the notice were satisfactory. (M.G.L. c. 31, § 14 and copies of HRD Forms 13 and 15, which are attached). Based on the requirements of M.G.L. c. 31, §§ 12-14, it is highly probable that HRD would have and will approve the Town's provisional appointment of Mr. Nguyen to the position of Sanitarian.
>
> Even if, for the sake of argument only, HRD did not approve the Town's provisional appointment of Mr. Nguyen to the Sanitarian position, the remedy should be for the Town to restart the provisional appointment process."

The Town concluded its argument for dismissal of the appeal by alleging that the Appellant's appeal was time-barred from being considered by the Commission due to late filing. In support of this allegation, the Town stated the following:

> "In addition to the standing and jurisdictional issues, the Appellant's appeal should be dismissed because it was untimely. The Appellant filed her appeal with the Commission on January 11, 2007, pursuant to M.G.L. c. 31, §§ 42 and 43, seeking to contest an action that she clearly knew about by November 20, 2006 (the date she and her Union filed a contractual grievance regarding her non-appointment). (Jt. Exhs. 11 and 12). The clear statutory language of M.G.L. c. 31, §§ 42 and 43 requires a person seeking to appeal a decision of the appointing authority to appeal to the Commission within **ten days** after she knew or should have known about the action being appealed. The Massachusetts courts have specifically determined, based on the unequivocal requirements of M.G.L. c. 31, §§ 42 and 43, that the Commission lacks jurisdiction to entertain appeals not filed within §§ 42 and 43 ten day limit. See Town of Falmouth v. Civil Service Commission, 64 Mass. App. Ct. 606, 609 (2005), citing, Cheney v. Assessors of Dover, 205 Mass. 501, 503 (1910). If the timely filing requirements of the statute are not specifically followed, the aggrieved person loses the benefit of the remedy. See id."

Appellant's Argument in Opposition to the Dismissal of Appeal

The Appellant contends that she does, indeed, have standing to challenge her non-selection for provisional appointment to the Sanitarian position. She asserts that the Commission has the authority to hear her appeal and grant her a remedy pursuant to both G.L. c. 31, § 2(b) and the Commission's equitable powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993 (hereafter "Chapter 310").

In making her case that the she is a "person aggrieved" as defined by section 2(b), the Appellant stated the following in her written opposition to the Respondent's Motion to Dismiss the Appeal:

> "Sections 12 and 13 of the Law require an appointing authority to seek approval from the administrator before making any provisional appointments. In the instant case, the Town failed to seek approval of the administrator prior to provisionally appointing Mr. Nguyen to the position of Sanitarian. The Town's failure to follow the mandates of sections 12 and 13 created a situation where the administrator was unable to act. Once the administrator failed to act, the Appellant, a permanent civil service employee and applicant for the position of Sanitarian, became a "person aggrieved" as defined by G.L. c. 31, § 2(b). As a "person aggrieved", the Law confers standing on the Appellant to challenge her non-selection."

In the alternative, the Appellant argues that, even if she does not have standing to be heard by the Commission pursuant to section 2(b), Chapter 310 provides the Commission with equitable powers to remedy situations that are created through no fault of a civil service employee. Chapter 310 provides that: *"If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights notwithstanding the failure of any person to comply with the requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.*"

The Appellant relies on Chapter 310 to cure the erroneous filing of her appeal pursuant to sections 42 and 43, rather than section 2(b), by citing the provision in Chapter 310 that states **"***the civil service commission may take such action as will restore or protect such rights notwithstanding the failure of any person to comply with the requirement of said chapter thirty-one.***"** (*Emphasis added*.) The Appellant asserts that her failure to cite section 2(b) should be "overlooked" as it did not prejudice the Town in any way, in that the "Town has always known exactly what actions the Appellant is appealing; and was not disadvantaged by the minor discrepancy."

The Appellant avers that the Town did not substantially comply with the provisions of section 12 when it provisionally appointed Mr. Nguyen to the position of Sanitarian in November 2006. By failing, as stipulated, to seek the authorization of the Personnel Administrator (HRD) to make the appointment according to statute, the Appellant maintains that a "negative cascading effect took place" as a result. The Appellant supported this claim by stating the following:

> "The mandates of Section 12 trigger further obligations under both G.L. c. 31, §§ 13 and 14. Thus, if the Town had sought proper approval from the personnel administrator, which it did not, the Town would have been further obligated under Section 13 to take the following action:
>
> *'[a]n appointing authority, in requesting authorization to make a provisional appointment, shall file with the administrator or, if the appointing authority is a department, board, commission, institution or other agency within a executive office, with the secretary in charge of such office, a notice containing: (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that the person proposed for the provisional appointment* ***meets the proposed requirements for appointment*** *to the position and possesses the knowledge, skills and abilities necessary to perform such duties.'*
> G.L. c. 31, § 13 (emphasis added).
>
> The Town did not take any of the actions enumerated in Section 13. This failure is not inconsequential, and the ramifications of this failure become glaringly apparent when one examines the information required under the statute.
>
> Section 13's mandates are necessary in order for the personnel administrator to determine the type of examination which should be held

by the administrator for the given title in the absence of suitable examination. By failing to comply with Section 13, the administrator was without the information necessary to determine the type of examination which should be held for the title. Further, the statute also sets safeguards such that in the absence of an examination, the provisional appointee must possess the requisite knowledge for the position. Again, this was not determined in the present case. Moreover, the Appellant **took and passed** the last examination that was administered. The Appellant's status as an applicant **who took and passed** the prior examination was never reported to the administrator.

Third, the negative cascading effect continued because the Town failed to follow the provisions of G.L. c. 31, § 14. Pursuant to Section 14, the Town was obligated to take the following action:

'Upon receipt of the notice described in section thirteen, the administrator or the secretary in charge of the executive office, as the case may be, may authorize a provisional appointment ***if he determines that the contents of the notice are satisfactory****. If the administrator or secretary and the appointing authority which filed the notice agree that the duties, qualifications and entrance requirements are correct as stated in the notice and if no person who meets the entrance requirements can be found for provisional appointment to the position pending the holding of an examination and the establishment of an eligible list, the position shall remain unfilled until such eligible list is established; provided, however, that* ***if an emergency exists, and the appointing authority describes the reasons for the emergency, states that such position must be filled because of such emergency, and submits a statement which describes to the satisfaction of the administrator the steps which have been taken to find a person who meets the entrance requirements*** *for the position, the administrator may authorize a provisional appointment of a person who does not meet such entrance requirements. Such authorization in the case of such emergency shall not constitute a finding that the person so*

provisionally appointed is eligible to take the examination for such position.'
G.L. c. 31, § 14 (emphasis added).

In the present case, no notice was sent to the personnel administrator. No analysis was undertaken with respect to whether the contents of the notice were satisfactory. No emergency was declared. No statement articulating the reasons for the emergency were submitted. In short, the personnel administrator was not afforded the ability to conduct **any** of the statutory analysis that the legislature assigned.

Further, Section 14 goes on to provide:

'Each provisional appointment shall be reported by the appointing authority to the administrator. A provisional appointment may be terminated by the administrator at any time and, except as provided in the preceding paragraph, shall be terminated forthwith whenever the administrator or secretary shall determine that the person appointed does not, in fact, possess the approved qualifications or satisfy the approved requirements for the position. The administrator shall have the authority to terminate a provisional appointment which was approved by a secretary of an executive office.'
G.L. c. 31, § 14.

Again, if the personnel administrator has no notice of the provisional appointment it cannot determine if the "person appointed . . . possessed the approved qualifications."

The Appellant further argues that the Town can not be excused for its non-compliance with sections 12-14 in making the provisional appointment. According to the Appellant, the Town's explanation that it did not notify HRD of the appointment because the last eligibility list for the position of Sanitarian was revoked by the HRD in 1997 should fail. The Appellant offers that section 25 grants HRD "discretion to extend an eligibility list

provided 'no new list is established, in which case eligibility of all persons shall be extended until a new list is established for the same position.'" In furtherance of this argument and in conclusion, the Appellant stated:

> "Here, it is conceivable that the personnel administrator could have revived the old eligibility list, which the Appellant was on, if it was determined that the list was still "suitable." Had this in fact occurred, the Appellant would have been the proper person selected for the Sanitarian position. The personnel administrator, however, was never provided this opportunity, and the fact that the Appellant had took and passed the last examination was overlooked."

Conclusion

After full review and consideration of the arguments as presented by both parties in this matter, the Commission finds that, based upon the documents and stipulations submitted and the issues addressed in this matter, a bifurcated decision is necessary to resolve the two disputed issues relevant to the Motion to Dismiss the appeal filed by the Respondent.

1. Does the Appellant have standing to file this instant appeal challenging the Town's provisional appointment of Mr. Nguyen to the position of Sanitarian in November 2006?

The Appellant's appeal in this matter fails on several levels and must be dismissed. The Appellant's appeal was filed pursuant to G.L. c. 31, §§ 42 and 43 on January 11, 2007, seeking to contest an action that she clearly knew about by November 20, 2006, the date she and her Union filed a contractual grievance regarding her non-selection. The clear statutory language of sections 42 and 43 requires a person seeking to appeal a decision of the Appointing Authority to appeal to the Commission within **ten** days after

she knew or should have known about the action being appealed. The instant appeal was filed approximately **fifty** days following the action and is time-barred from being heard.

Additionally, an appeal filed pursuant to sections 42 and 43 must allege that an Appointing Authority has failed to follow the requirements of section 41 in taking an action which has affected a civil service employee's employment or compensation. Section 41 governs discharges, removals, suspensions, transfers, abolition of offices and reductions of rank or pay. Here, the Appellant alleges none of these actions by the Town.

The Commission has been amenable in the past to granting some latitude to Appellants whose appeals are ministerially flawed but whose objectives are clear. The Appellant argued that she could have been heard pursuant to G.L. c. 31, § 2(b) as she was a "person aggrieved", according to that section of the statute, by a "failure to act on the part of the administrator". The Appellant further asserted that the Town would not be harmed by amending her appeal to indicate that it was filed pursuant to section 2(b) as she was challenging her non-selection to a position upon which appointment the administrator failed to act.

However, the text of section 2(b) goes on to require further conditions under which a person would be deemed "aggrieved" by a failure of the administrator to act. Importantly, and critical to the Commission's well-settled position on whether persons challenging provisional appointments are "aggrieved", section 2(b) requires, not only specific, written allegations that the failure of the administrator to act "*was in violation of this chapter, the rules or basic merit principles"* but also that "*said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."* (*Emphasis added*)

Although the Commission is well-aware of the flawed appointment process which occurred and which will be addressed in the next section of this conclusion, the Commission finds no actual harm to the Appellant's "actual employment status" as a result of this provisional appointment. As was discussed previously, in June of 1996, the Town provisionally appointed the Appellant to the position of Sanitary Inspector. The Appellant attained permanent civil service status in the Sanitary Inspector position as of July 1, 2000, as a result of a special act of the legislature conferring permanent civil service status upon certain Town employees who had been provisionally appointed to their positions (Chapter 159, section 338 of the Acts of 2000). As of the date of this written submission, the Appellant remains in the position of Sanitary Inspector. Further, all of the evidence submitted strongly suggests that Mr. Nguyen possessed the relative knowledge, skills and abilities to perform the duties of the position of Sanitarian, in accordance with the basic merit principles.

The Appellant asserts that the Town's failure to contact the HRD to determine if there was a suitable eligible list for the position of Sanitarian, denied the administrator the opportunity to determine if the "person appointed . . . possessed the approved qualifications" (section 14), as well as to determine if the "old" eligibility list was still "suitable" and should be revived so the Town could make a permanent appointment. The Appellant's name appeared on the "old" list. However that previous list, compiled from the results of an examination given in 1990, had been affirmatively revoked by the HRD in 1997. The Commission is unaware of any precedent for such a stale eligibility list to be revived. Moreover, the Appellant provided no examples of any such precedent. The Town's assertion, based upon Dr. Balsam's affidavit, was persuasive that:

> "HRD revoked the 1990 eligibility list in 1997 in order to maintain the very merit system on which civil service is based. (M.G. L. c. 31, § 25). A fifteen year old exam in the public health field is meaningless in determining whether an individual is qualified for a position in 2006. Over the past fifteen years there have been innumerable scientific and technological advancements that have dramatically changed the skills, knowledge and abilities required for many positions in the public health field, including the Sanitarian position."

It should be noted that the Town's explanation that it neglected to ascertain from HRD whether there existed a suitable eligibility list, as required by the statute, because it was "common knowledge" that the previous list had long since been revoked was less persuasive and will be addressed in the next section. Nonetheless, while the Town's admitted failure to adhere to the applicable sections of the Civil Service statute might subject it to sanction by this Commission, said failure does not open the door to the Commission hearing the Appellant on the merits of her claim.

Lastly, the Appellant urges the Commission to employ its powers of equitable relief and forgive her the errors of her appeal filing by citing the provision in Chapter 310 that states **"***the civil service commission may take such action as will restore or protect such rights notwithstanding the failure of any person to comply with the requirement of said chapter thirty-one.***"** Again, the Appellant failed to indicate how her Civil Service rights were "prejudiced through no fault of her own." (Chapter 310).

The Commission finds, by a preponderance of the credible evidence submitted for the record of this matter, that the Appellant's appeal should be dismissed because the Appellant lacks standing to bring such an appeal, the Appellant's appeal fails to state a claim for which relief may be granted and the Commission lacks jurisdiction to hear the Appellant's appeal. This finding is made pursuant to G.L. c. 31, §§ 42 & 43 and 801 CMR 1.01(4)(a), 1.01(7)(a) and 1.01(7)(g)(3).

2. Did the Town substantially comply with G.L. c. 31, § 12 when it provisionally appointed Mr. Nguyen to the position of Sanitarian in November 2006.

Although the Town did not prejudice the Appellant's Civil Service rights by its provisional appointment of Mr. Nguyen, the Commission cannot ignore the fact that the Town did not comply with the requirements of G.L. c. 31, § 12, 13 or 14 in making that appointment and must be sanctioned. This series of sections within the Civil Service statute is vital to insuring that provisional appointments to Civil Service positions are based on relative knowledge, skills and abilities and that they are not politically influenced or jaded by any other impermissible reasons. In making the provisional appointment in question, the Town did, as the Appellant brought to the Commission's attention in this matter, "keep the personnel administrator out of the loop" relative to the appointment. In so doing, the Town left itself and Mr. Nguyen open to scrutiny which easily could have been avoided had it complied with Civil Service requirements.

The Town argued that its process in arriving at a suitable candidate for provisional promotion was solid and that Mr. Nguyen is eminently qualified for the position of Sanitarian. The Town further opined that, "it is highly probable that HRD would have and will approve the Town's provisional appointment of Mr. Nguyen to the position of Sanitarian." That may well be. However, unless the Appellant brought this action against the Town challenging this provisional appointment, those assertions would have remained unknown and unsubstantiated.

To claim that it was "common knowledge" that there existed no suitable list from which it could select a permanent Sanitarian is absolutely no excuse for neglecting to follow the applicable statute and ascertain from the HRD if that fact was, indeed, so.

Additionally, the Town was required to ensure that *"Each provisional appointment shall be reported by the appointing authority to the administrator. A provisional appointment may be terminated by the administrator at any time and, except as provided in the preceding paragraph, shall be terminated forthwith whenever the administrator or secretary shall determine that the person appointed does not, in fact, possess the approved qualifications or satisfy the approved requirements for the position."* (G.L. c. 31, § 14) This failure on the part of the Town may be the most unsettling as it potentially (and we emphasize "potentially") opens the process to question as to its integrity.

Despite the failure to comply with the applicable sections of the Civil Service statute, however, the Commission finds that the Town did not exhibit sinister motives in doing so. The Town is persuasive in its argument that it should be provided with an opportunity to "cure any non-compliance" with section 12. The fact remains, however, that Mr. Nguyen's appointment has never been officially recognized by HRD. HRD submitted credible documents to this hearing that indicated that there is no Civil Service record for Mr. Nguyen and that it has no record of his provisional appointment to the position of Sanitarian in November 2006.

ORDERED

The following is ordered by the Commission relative to this appeal:

1. The appeal on Docket No. G2-07-43 is hereby ***dismissed.***
2. Within sixty (60) days, the Town must comply with all requirements of the civil service law pertaining to provisional appointments, including, but not limited to, providing HRD with notification that a vacancy existed for a provisional appointment, the names of candidates who were willing to accept the position and/or were considered for appointment; and the name of the candidate selected.

Civil Service Commission

_____
John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Henderson, Stein and Marquis, Commissioners) on February 26, 2009.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Michael J. Maccaro, Esq. (for Appellant)
Brian Magner, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)